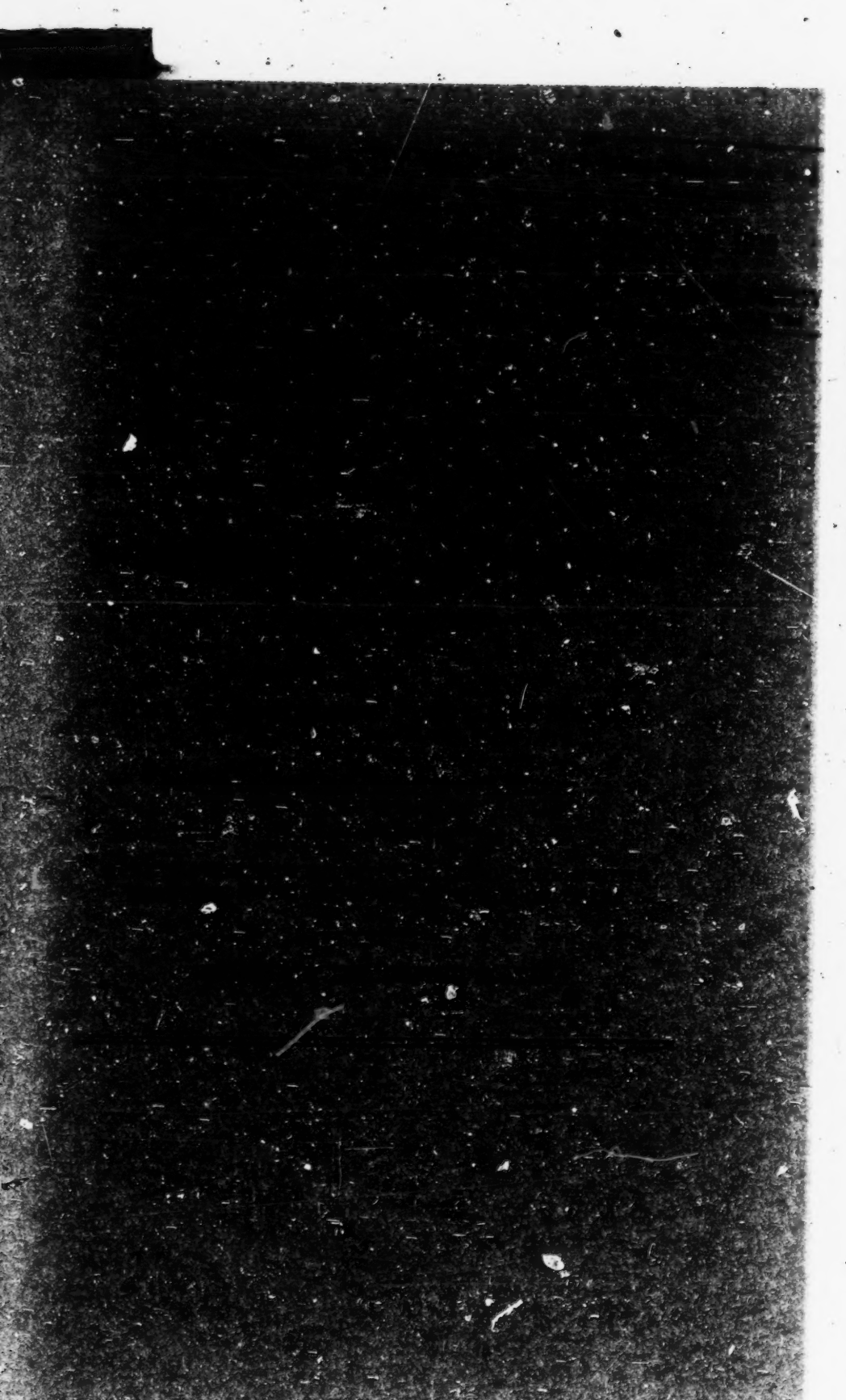

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 687

THE UNITED STATES OF AMERICA, APPELLANT

v.

NEAL POWERS AND RENE ALLRED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 41–48) is not yet reported.

JURISDICTION

The order of the District Court was entered on January 4, 1939 (R. 48). The appeal was prayed and allowed on January 28, 1939 (R. 48, 50). The jurisdiction to review the judgment complained of, by direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and by Section 238 of the Judicial Code, as amended.

Probable jurisdiction was noted by this Court on March 13, 1939.

QUESTION PRESENTED

May a prosecution for violation of and conspiracy to violate the Connally (Hot Oil) Act of February 22, 1935, committed prior to June 16, 1937, the date originally fixed for the expiration of that Act, be maintained after that date, the Act having beeen extended to June 30, 1939, by the Act of June 14, 1937?

STATUTES INVOLVED

The relevant portions of the Connally (Hot Oil) Act of February 22, 1935 (c. 18, 49 Stat. 30, U. S. C., Supp. IV, Title 15, Secs. 715 *et seq.*), and the Act of June 14, 1937 (c. 335, 50 Stat. 257), extending the Connally Act of 1935, are set out in Appendix A, *infra*, pp. 27–35.

STATEMENT

On September 17, 1938, H. E. Hines, Neal Powers, and Rene Allred were indicted in the District Court of the United States for the Southern District of Texas (R. 2). The indictment was in ten counts. The first count (R. 3–10) charges a conspiracy by the defendants to violate the Act of February 22, 1935, as amended, by transporting in interstate commerce, from the Conroe Oil Field in Montgomery County, Texas, to Marcus Hook, Pennsylvania, oil produced, transported and withdrawn from storage in excess of the amounts per-

mitted to be produced, transported and withdrawn from storage under the laws of the State of Texas and under the regulations and orders made pursuant thereto. The conspiracy is alleged to have begun on or about September 4, 1935, and continued until on or about March 15, 1937 (R. 4). The count alleges 45 overt acts (R. 4–10).

Each of the remaining nine counts (R. 10–14) charges a substantive violation, and alleges that defendants transported in interstate commerce oil produced, transported and withdrawn from storage in excess of the amounts permitted to be produced, transported and withdrawn from storage by the laws of the State of Texas and the regulations made pursuant thereto. These transportations are alleged to have been made between the same places alleged in the conspiracy count, and on various dates from November 4, 1935, to March 20, 1936.

On October 14, 1938, Neal Powers and Rene Allred, appellees herein (hereafter referred to as defendants) each filed demurrers to the indictment and motions to quash and dismiss the indictment on numerous grounds (R. 15–27, 28–41). The District Court rejected some of these grounds, holding (1) that the indictment sufficiently stated the nature and character of the charge made (R. 42–43) and that the acts had been done knowingly (R. 43); (2) that the Act is applicable to oil produced subsequent to the date of its enactment, as well as to that produced prior thereto (R. 43–44);

and (3) that the Act is constitutional (R. 44). One of the grounds urged—that certain Texas statutes had expired—was mentioned but not decided (R. 44–45). Finally, however, the District Court sustained the demurrers on the sole ground that the indictment, charging violations of the Act before its original expiration date, but having been returned after that date, could not be maintainted (R. 44–48). Accordingly, on January 4, 1939, the District Court dismissed the indictment (R. 48).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that prosecution under the indictment was barred on the ground that violations of the Connally Act of February 22, 1935, committed prior to June 16, 1937, could not be punished thereafter, notwithstanding the provisions of the Act of June 14, 1937, extending the duration of the Connally Act until June 30, 1939.

2. In applying the rule that after the expiration of a law no punishment may be inflicted for violations committed while it was in force, unless special provision is made therefor, since there was no attempted prosecution of the offenses involved subsequent to the expiration of the statute upon which the indictment was predicated, the Connally Act of 1935 having been extened by Congress during its life to a date which has not yet expired, i. e., June 30, 1939.

3. In rejecting as inapplicable the rule that where a statute is amended by substantially re-enacting it, offenses occurring prior to amendment may be prosecuted thereafter.

4. In holding that the prosecution under the indictment was not saved by virtue of the provisions of R. S., Section 13.

5. In failing to hold that prosecution under the conspiracy count could be maintained, even though prosecution under the substantive counts may not be sustainable.

6. In sustaining demurrers of the defendants Neal Powers and Rene Allred, and each of them to the indictment and to each count thereof.

7. In sustaining the motions of the defendants Neal Powers and Rene Allred to quash the indictment and each and every count thereof.

SUMMARY OR ARGUMENT

I

The District Court in this case has held that violations of the Connally Act occurring before the date originally set for its expiration cannot now be punished, since the Act was temporary only and contained no clause continuing liability for such violations. We believe the conclusion to be erroneous. Prior to the original date of expiration the Act was extended to June 30, 1939, and has in fact never ceased to be in effect. There is

only one Act, and at least until June 30, 1939, it affords complete statutory support for the present prosecutions. Such little authority as there is is completely in accord. *The Irresistible,* 7 Wheat. 551, relied upon by the District Court, is plainly inapplicable since it refers only to a situation in which a temporary Act has expired.

II

A. But the decision of the District Court is erroneous even on its assumption that the violations alleged were of a "First" Act which expired on June 16, 1937. The expiration of a temporary statute does not prevent a prosecution for offenses committed while it was in effect. A contrary rule of the common law has been stated in early decisions of this Court, but it is simply an arbitrary assumption of legislative intent which no longer accords with the actual intent of Congress, if, indeed, it ever did. Since those early decisions the parallel common-law rule with respect to the termination of prosecutions after the repeal of a criminal Act has been specifically changed by Congress, and by practically every other legislative body originally subject to it. Revised Statutes, Section 13. Moreover, the common-law rule as to temporary statutes inevitably makes them completely ineffective for a substantial period of time before the date actually set for their expiration. The decision in *United States* v. *Chambers,* 291

U. S. 217, is not to the contrary. The question there was one of the power of Congress rather than of its intent.

B. Finally, even if there be two Acts, and the common-law rule applies, nevertheless the "Second" Act was competent authority which authorized the continuance of the present prosecutions. The principle that an amendment of a criminal statute does not absolve the guilt of the one who has violated the statute prior to the amendment is directly applicable.

ARGUMENT

I

THE ACT UNDER WHICH THE PRESENT INDICTMENT WAS RETURNED HAS NEVER EXPIRED

The District Court, in the present case, sustained demurrers to an indictment which charged the defendants with several violations of the Connally (Hot Oil) Act of 1935, as amended, *infra*, pp. 27–35. The decision was based solely upon the ground that the violations charged in the indictment were no longer punishable, since they occurred prior to June 16, 1937, the date upon which the Act was originally to cease to be in effect. Section 13, *infra*, p. 34. The court relied upon the fact that the Act was a temporary one, and that neither the original Act nor the amendment by which the expiration date was changed from June 16, 1937, to June 30.

1939 (Act of June 14, 1937, *infra*, pp. 34–35), contained a clause continuing liability for acts done prior to the original expiration date. The court dismissed as irrelevant the fact that, due to the amendment, ***the Act has never ceased to be in effect.***

We submit that the decision is plainly wrong. The question, of course, is one of the *intention* of Congress, for there can be no doubt that Congress has *power* to maintain in force, for the purpose of the continuance of prosecutions, its own enactments after their expiration or repeal. *United States* v. *Chambers*, 291 U. S. 217, 224. Even if the prior Congress which originally passed the Act had intended that all liability for violations of it should cease on June 16, 1937 (an intention which we do not believe existed, see pp. 16–24, *infra*), nevertheless, the subsequent Congress, which amended the Act, could have ignored that intent, and have continued it in force for another limited period beyond that date, or in perpetuity. Every legislative body may modify or repeal acts passed by itself or its predecessors. Cf. *Newton* v. *Commissioners*, 100 U. S. 548, 559; *Mongeon* v. *People*, 55 N. Y. 613.

In the present case we believe that there can be no doubt as to the *intention* of Congress. By the amendment to the Act, passed in 1937 before the original expiration date, Congress has specifically enacted that "This Act shall cease to be in effect on June 30, 1939" (Section 13, as amended). That

date is still in the future. Congress, in other words, as clearly as it possibly could do so, has declared that the Act shall continue in effect.[1]

Under the amendment the situation is precisely the same as that which would have existed had that been the date originally stated. The lower court, throughout its opinion, assumed that the case involved two independent statutes, one expiring on June 16, 1937, and a new Act coming into effect immediately thereafter, which in turn would expire on June 30, 1939. But there is no "First Act" or "Second Act," as they were referred to throughout the District Court's opinion (see R. 46-48). There is simply one statute, which Congress first stated would cease to be in effect on June 16, 1937, but prior to that date extended for two more years, to June 30, 1939. The defendants were indicted for violation of that Act. At least until June 30, 1939, there is complete statutory support for that prosecution.

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[1] The intention of Congress in changing the date upon which the Act was to cease to be in effect is clear from the amendment itself. If further proof were necessary, however, the title of the amendatory statute, which may be referred to as indicative of Congressional intent (*White* v. *United States*, 191 U. S. 545; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457), is conclusive. It reads:

"An Act To continue in effect until June 30, 1939, the Act entitled 'An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes,' approved February 22, 1935."

We have been unable to find any authority whatever for the conclusion reached by the District Court—that even though a temporary Act be continued prior to its original expiration date, offenses committed before that time cannot thereafter be prosecuted. The authorities to the contrary are not numerous, but they completely reveal the fallacy of defendants' position. In *Sims* v. *United States,* 121 Fed. 515 (C. C. A. 9th), an indictment was returned on June 7, 1902, for violating, on February 15, 1902, a 10-year Chinese Exclusion Act which was to have expired on May 4 or 5, 1902. On April 29, 1902,[2] Congress provided that the law should be "re-enacted, extended, and continued * * * until otherwise provided by law". The contention here sustained was urged against the indictment, and the same authorities as are cited in the District Court's opinion here were relied upon. The court stated (121 Fed. at 517–518):

> The act of May 5, 1902,[2] expressly continues in force all the laws prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent. It is a particular provision continuing such laws in force for all purposes. It went into effect while those laws were still in existence. There was no break, no hiatus, in the existing legislation providing

[2] The opinion gives the date as May 5, 1902 (121 Fed. at p. 517), which is apparently an error. See Act of April 29, 1902, c. 641, 32 Stat. 176.

> for the exclusion of Chinese and for the punishment of infractions of the act. The act of May 5, 1902, did not create a new law or repeal the old. It simply extended the life of the existing statutes.

We have been unable to discover any other case in the United States in which the contention has been raised.[3] Perhaps it is not unreasonable to assume that it is wholly devoid of merit. At least in England, the question has been settled for over 300 years, and has not even been raised in recent times. In *Dingley v. Moor,* Cro. Eliz. 750, 78 Eng. Rep. 982 (1600), a temporary statute had been made permanent by a later act. An indictment was laid under the temporary statute, and sustained. The court stated:

> * * * where a statute is made perpetual in part, or in whole, without any new addi-

[3] In *The General Pinkney*, 5 Cr. 281, the ship libelled had violated an Act passed on February 28, 1806, and limited to one year. On February 24, 1807, the Act was continued until April 26, 1808. It had expired completely before the decision of this Court. The opinion first demonstrates that an appeal in admiralty results in a hearing *de novo* in the appellate court, and then finds that the forfeiture can no longer be enforced. If the rule here applied by the District Court is sound, the Court could have much more easily disposed of the case on the ground that the original condemnation in the District Court was erroneous, for at that time (July 23, 1807) the original temporary act under which the offenses were committed had expired. Of course, the decisions in both the District Court and the Circuit Court in that case are directly contrary to the result here reached. See also *Commonwealth* v. *Cain*, 14 Bush (Ky.) 525, 534.

> tion or alteration, the offence may well be supposed against the form of the first statute; for that Act is made to continue.

The question arose again in 1736, in *Rex* v. *Morgan,* 2 Strange 1066, 93 Eng. Rep. 1036, in which a temporary law, for five years, was continued with some alteration. An indictment was laid under the first law. Lord Chief Justice Hardwicke stated:

> When an act is continued, every body is estopped to say it is not in force. And as it is not altered in this respect, it is but a common continuance *quoad hoc.*

Again, in 1790, in *Shipman* v. *Henbest,* 4 T. R. 109, 100 Eng. Rep. 921, an action was brought by an informer under 1 J. 1, c. 22, a temporary statute which imposed certain penalties, and which had been continued temporarily. Lord Kenyon, Chief Justice, said (p. 114):

> We are all most clearly of opinion that this must be considered as an action on the 1 J. 1, c. 22; and that the subsequent laws, which have continued it from time to time, all give effect to it as an act made in the reign of the 1 J. 1.

See also *Rex* v. *Swiney,* Alcock & N. 131, 132 (1832); *Ex parte Drydon,* 5 T. R. 417, 101 Eng. Rep. 235.

The text writers uniformly have taken the same view. Chancellor Kent, citing the English cases discussed above, states his agreement with the rule

laid down in those cases. Kent's *Commentaries* (14th Ed.), Vol. 1, p. 465. The same rule is stated in Endlich, *Interpretation of Statutes* (1888), p. 693:

> * * * if a temporary Act be continued by a subsequent one, or an expired Act be revived by a later one, all infringements of the provisions contained in it are breaches of it rather than of the renewing or reviving statute.

See also Dwarris, *Statutes* (2d ed. 1848) p. 528. Compare Coke, *Institutes*, Vol. 4, p. *171.

The decisions, and the statements in the texts, are, we believe, conclusive evidence against the conclusion of the District Court that the amendment of the Act in 1937 was intended to substitute a new Act, and not to continue the original act in effect. The question, of course, is not one of law—Congress can do as it wishes, and the problem is what it has intended to do. Nevertheless, the authorities cited above illustrate that in the absence of evidence to the contrary, the extension of a temporary act by a later one is not generally to be considered as the creation of a new statute, but rather the renewal and continuance of the old for an additional period of time.

Certainly the decisions relied upon by the District Court do not establish a contrary canon of interpretation. In *The Irresistible*, 7 Wheat. 551, an information had been filed against a ship under a temporary statute, which was, however, repealed,

with a proviso. Chief Justice Marshall held that the proviso simply left the statute as if the repealing Act had never been passed. Consequently, the common-law rule as to temporary Acts was applicable. He stated it as follows (p. 551):

> Now, it is well settled, that an offense against a temporary act cannot be punished, *after the expiration of the act,* unless a particular provision be made by law for the purpose. [Italics supplied.]

The rule had been earlier stated in *The General Pinkney* (*Yeaton* v. *United States*), 5 Cranch 281, 282. See also the statement of the common-law rule in Maxwell, *Interpretation of Statutes* (6th ed. 1920), p. 728.

The decision is in terms inapplicable to a case, such as that here presented, where the temporary act *has not expired.* We shall urge below, pp. 16–24, that the common-law rule with respect to the effect of the expiration of the temporary statutes can no longer be accepted as a correct presumption as to the intention of Congress. But apart from that, the rule, as the early cases cited above reveal, had application only to a temporary act which had not been extended.

We submit, therefore, that the Act under which the present indictment was laid should be considered for all purposes exactly as if Section 13 had originally stated that it should cease to be in effect on June 30, 1939, and that the indictment should be held valid and proper. A statute should not be given a construction which will render it

ineffective or inefficient if another and more reasonable construction is equally possible. *Graham & Foster* v. *Goodcell,* 282 U. S. 409; *Bird* v. *United States,* 187 U. S. 118. Under the wholly artificial dichotomy of the court below, an Act which was amended only by changing a date, and was, we submit, obviously meant to function in all respects as would an ordinary statute during the period until it was finally to cease to be in effect, becomes two unrelated enactments, dealing with the same subject, but otherwise so independent that the amendment cannot even continue to give life to the Act which it amends. Criminal statutes, of course, are to be construed strictly, but, like other statutes, they are to be construed to carry out the obvious intent of the legislature. *Fasulo* v. *United States,* 272 U. S. 620; *Lamar* v. *United States,* 241 U. S. 103. This, we submit, the construction adopted by the court below wholly fails to do.

II

EVEN IF THE ASSUMPTION OF THE DISTRICT COURT BE ACCEPTED—THAT THERE WERE TWO ACTS, THE FIRST EXPIRING ON JUNE 16, 1937—NEVERTHELESS, ITS DECISION IS ERRONEOUS

As we have stated above, we believe that in no real sense can there be said to be two statutes—a "First" and a "Second" Act. Rather, there was one continuing Act, which has not yet expired, and which gives complete statutory support to the present prosecution. Nevertheless, even if the assump-

tion of the District Court be accepted, we submit that, for several reasons, offenses against the so-called First Act may still be prosecuted.

1. THE EXPIRATION OF A TEMPORARY STATUTE DOES NOT PREVENT A PROSECUTION FOR OFFENSES COMMITTED WHILE THE ACT WAS IN EFFECT

Chief Justice Marshall stated the common-law rule in *The Irresistible*, 7 Wheat. 551, that an offense against a temporary Act cannot be punished after the expiration of the Act, unless a particular provision be made by law for that purpose. The same statement had been made in *The General Pinkney*, 5 Cranch 281, which was followed in *The Ship Helen*, 6 Cranch 203. From 1822 to the present time the rule has apparently never been made the basis of decision in this Court.[4] We submit that it should no longer be deemed applicable to the temporary criminal statutes enacted by Congress.

We do not take issue, of course, with the principle that once legislative authority for a prosecution has ceased, the prosecution may no longer be continued. *United States* v. *Chambers*, 291 U. S. 217. This Court stated in the *Chambers* case that the principle is continuing and vital that "if the prosecution

[4] Occasional reference has since been made to the doctrine of those cases. See *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 465 (dissent); *The Reform*, 3 Wall. 617, 629; *Gwin* v. *United States*, 184 U. S. 669, 675; *United States* v. *Chambers*, 291 U. S. 217, 223; *Moore* v. *United States*, 85 Fed. 465, 468 (C. C. A. 8th); *Green* v. *United States*, 67 F. (2d) 846 (C. C. A. 9th). See also *Commonwealth* v. *Cain*, 14 Bush (Ky.) 525, 536.

continues the law must continue to vivify it" (291 U. S. at 226).

But acceptance of that principle does not require acceptance of the common-law rule, as stated by Chief Justice Marshall, that "particular provision" must be made if punishment is to be possible after the expiration date set in the statute. That rule finds its sole basis in the assumption that Congress, by stating that a law shall cease to be in effect on some future date *intends* not only that the prohibited acts shall no longer be forbidden, but also that there should be a general absolution of all those who had done the prohibited acts before the expiration date. And it is solely a question of intent. Unquestionably, Congress could clearly express its will that prior violations should be punished even though they were no longer criminal, and that will would be given effect. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 333; *Stevens* v. *Dimond*, 6 N. H. 330, 332. Or, Congress could, by a general enactment, state that to be its will with respect to all temporary enactments, and that expression of Congressional intent would be given effect even though the particular temporary Act was silent. Cf. *Hertz* v. *Woodman*, 218 U. S. 205, 216. The present case, assuming as did the District Court that the "First" Act had expired, presents the question whether Congress intended, by stating that "This Act shall cease to be in effect on June 16, 1937" (Section 13, before its amendment), in-

tended to absolve any person who prior to that date had violated the Act but had not been finally convicted therefor. Or, in other words, does the old common-law rule, that in the absence of specific provision a general legislative pardon is to be implied, represent a correct statement of the intention of Congress in passing this temporary statute? We believe that it does not.

The common-law rule, although categorically stated by Chief Justice Marshall, finds surprisingly little judicial support either before his statement or since that time. Maxwell, *Interpretation of Statutes* (6th ed. 1920), p. 728, also states it as the rule formerly prevailing in England, but without exception the authorities which he cites deal with the *repeal* of statutes, rather than their *expiration*. Indeed, it may well be doubted whether the statement in Maxwell is correct. In *Stevenson* v. *Oliver*, 8 M. & W. 234 (1841), 151 Eng. Rep. 1024, both Abinger, C. B., and Alderson, B., stated their belief, *obiter*, it is true, that offenses committed against a temporary Act while it was in force could be punished thereafter. In 1921, in *Rex* v. *Ellis*, 125 L. T. R. 397, Darling, J., states that the views of Abinger and Alderson might be "perfectly reasonable" had not the contrary been settled by *Rex* v. *McKenzie*, Russ. & R. 429 (1820), 168 Eng. Rep. 881, apparently ignoring the fact that *Rex* v. *McKenzie* dealt with a repeal, and not an expiration. See also Bishop, *Statutory Crimes* (2d ed. 1883), Sec. 182.

But whatever be the historical basis for the rule stated in *The Irresistible* and *The General Pinkney*, we believe that it no longer represents Congressional intent with respect to temporary statutes. There is, in fact, almost conclusive evidence that it does not.

The most persuasive fact is the Congressional treatment of the parallel rule of the common law that the repeal of a statute automatically terminated all prosecutions under it, in the absence of a saving clause. The two rules—if, indeed, they can be said to be any more than two aspects of a single rule—are always stated together. For example, in Maxwell, the common-law rule is expressed as follows (p. 728):

> Where an Act expired or was repealed, it was formerly regarded, in the absence of provision to the contrary, as having never existed, except as to matters and transactions past and closed.

And in *The General Pinkney, supra,* Chief Justice Marshall stated the rule as follows (5 Cranch at p. 282):

> * * * it has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.

Any expression of legislative intent with respect to the repeal of statutes, in other words, should be almost necessarily equally indicative of the legislative intent with respect to the expiration of a temporary act. And, so far as repeals are concerned, the evidence of intent is not wanting. Congress, in common with practically every legislative body formerly governed by the common-law rule, has expressly abrogated it.

Historically, one of the last pronouncements of the rule came from this Court in 1870, in *United States* v. *Tynen*, 11 Wall. 88. Congress immediately passed a statute by which the rule was changed (Act of February 25, 1871, c. 71, 16 Stat. 431). That law, later Section 13 of the Revised Statutes, has since remained as an express legislative rejection of the presumption which the common law had made. Similar express rejections of the arbitrary assumption as to legislative intent have been made by the legislatures of 43 of the 48 States, by England (Interpretation Act of 1889, 52 & 53 Vict., c. 63, Sec. 38 (2)), by Canada and by its provinces, by Australia and by its provinces, and by other legislative bodies.[5] A more apparent example of legislative disagreement with a common-law rule would be difficult to find.

Section 13 of the Revised Statutes does not in terms apply to the expiration of a criminal statute.

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[5] See Appendix B, *infra*.

But realistically Congress cannot be said to have one intention when it repeals a statute and a diametrically opposite one when it provides at the beginning that the law shall be in effect only until a day certain in the future. The latter might equally well be called a repeal as of a future date, yet certainly R. S., Section 13 applies when a repeal is not to take effect immediately but at a stated time in the future. There is nothing inherent in a "temporary" statute that warrants the creation of an intention in Congress different from that which it has toward "permanent" Acts later repealed. From every point of view, when Congress stated in R. S., Section 13 that it did not intend a repeal to operate as a legislative pardon, it made clearly evident that it had the same intention with respect to the dates it might set for expiration of temporary statutes. See *Sims* v. *United States,* 121 Fed. 515, 517. The language of Mr. Justice Holmes in *Johnson* v. *United States,* 163 Fed. 30, 32 (C. C. A. 1st) quoted in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* No. 364, decided February 27, 1939, is peculiarly appropriate:

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set

> out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

See also *Funk* v. *United States,* 290 U. S. 371, 381; *Van Beeck* v. *Sabine Towing Co.,* 300 U. S. 342, 350; Landis, James J., *Statutes and the Sources of Law,* in Harvard Legal Essays, p. 213.

Indeed, from a practical point of view, there are even stronger reasons for believing that Congress would intend prosecutions to continue after a temporary statute had expired than after a permanent statute had been repealed. Under the common-law rule with respect to ~~requisite~~ REPEALS and expirations the legislature is deemed to intend that prosecutions be dismissed even if they are pending on appeal. Cf. *Massey* v. *United States,* 291 U. S. 608; *Hartung* v. *People,* 22 N. Y. 95; *Commonwealth* v. *Duane,* 1 Binney (Pa.) 601; *Lewis* v. *Foster,* 1 N. H. 61; *Key* v. *Goodwin,* 4 Moore & Payne Rep. (C. P.) 341 (1830). Hence there is an unavoidable period of perhaps even years between a violation and the final disposition of a prosecution. Consequently, when a statute makes known in advance its date of expiration, it is, under that rule, completely devoid of sanction long before that time. Violations of a law could be committed with impunity within a period of months or years before its termination. A two-year statute, such as the present Act, would have

almost no effective operation at all. Particularly, of course, is this true if one accepts the conclusion of the District Court in the present case, that even an extension of the statute is ineffective to continue prosecutions for acts done before its original date of expiration. If Congress, having regard to the "serious consequence sometimes incident to" the common-law rule of construction as to repeals (*Hertz* v. *Woodman, supra*), has expressly abrogated that rule, it must to an even greater extent have disapproved the rule which would render almost completely nugatory a temporary statute limited to a time less than that ordinarily required to complete a prosecution. As applied to an Act limited, like the present "First' Act, to two years, the common-law rule conflicts with the principle that no statute should be given a construction which would render it ineffective if another construction is possible. *Bird* v. *United States,* 187 U. S. 118.

Moreover, there was a certain amount of plausibility to the common-law rule that the repeal of a statute terminated all pending prosecutions under it, which does not exist in the rule as applied to temporary statutes. Disregarding the legalistic mold in which the doctrine was cast, a court might reasonably feel that a legislature, having, by a repeal, indicated its dissatisfaction with a statute, intended to treat it for all purposes as if it had never existed. "The repeal of the law imposing the

penalty is of itself a remission." *Maryland* v. *Baltimore & Ohio R. Co.*, 3 How. 534, 552. Obviously, however, the same intent cannot be imputed to a legislature which enacts a termination date at the same time as it enacts the statute itself.

The decision in *United States* v. *Chambers*, 291 U. S. 217, is not to the contrary. In that case the Court held that the common-law rule should be applied to the construction of the Twenty-first Amendment, and that all prosecutions under the former statutes were at an end. The distinction is one of *power* as against *intent*. In the *Chambers* case Congressional power had ceased because the people had withdrawn that power. Here, on the other hand, the question of power is not in issue: the sole question is one as to the intent of Congress.

B. THE AMENDMENT OF THE ACT IN 1937 CONSTITUTES A "PARTICULAR PROVISION" FOR THE CONTINUANCE OF THE PROSECUTIONS UNDER THE ORIGINAL ACT

Even if we accept, as we have done in the preceding subsection, the conclusion of the District Court that there was a "First" and a "Second" Act, and its further conclusion with which we have taken issue in that subsection, that violation of the "First" Act could not be punished after its expiration "unless a particular provision be made by law for the purpose" (*The Irresistible, supra*, 7 Wheat. 551), nevertheless we submit that the conclusion reached

by the District Court was erroneous. The 1937 amendment is, in every sense, "a particular provision" which has kept the statute alive for all purposes. It was passed before the original expiration date. Its necessary effect, as well as its explicit statement of purposes in its title (see p. 9, *supra*), was to continue to vivify the "First" Act. There is no warrant whatever for a construction of the "Second" Act which would at once admit that the same acts continue to be prohibited but deny that those acts committed prior to the amendment are no longer punishable.

The contention has sometimes been made that where a criminal statute is amended in some particular during the pendency of a prosecution, Congress by the amendment has intended to absolve an offender under the old statute. The contention has uniformly been rejected. *Schenck* v. *United States,* 249 U. S. 47, 53; *Goublin* v. *United States,* 261 Fed. 5 (C. C. A. 9th); *De Four* v. *United States,* 260 Fed. 596, 599–600 (C. C. A. 9th), certiorari denied, 253 U. S. 487; *Sage* v. *State,* 127 Ind. 15; *People* v. *Schoenberg,* 161 Mich. 88; *Hair* v. *State,* 16 Neb. 601. If, in those cases, Congress is deemed not to have intended those who violated the earlier Act should escape liability, *a fortiori,* here, when Congress has not changed but has simply extended the Act for all purposes, the same results should follow.

CONCLUSION

We submit, therefore, that the decision of the court below should be reversed.

Respectfully submitted.

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APRIL 1939.

APPENDIX A

Connally (Hot Oil) Act of February 22, 1935, c. 18, 49 Stat. 30 (U. S. C. Supp. IV, Title 15, Sec. 715-715*l*):

AN ACT To regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby declared to be the policy of Congress to protect interstate and foreign commerce from the diversion and obstruction of, and the burden and harmful effect upon, such commerce caused by contraband oil as herein defined, and to encourage the conservation of deposits of crude oil situated within the United States.

SEC. 2. As used in this Act—

(1) The term "contraband oil" means petroleum which, or any constituent part of which, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of a State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State, or any of the products of such petroleum.

(2) The term "products" or "petroleum products" includes any article produced or derived in whole or in part from petroleum or any product thereof by refining, processing, manufacturing, or otherwise.

(3) The term "interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, or from any place in the United States to a foreign country, but only insofar as such commerce takes place within the United States.

(4) The term "person" includes an individual, partnership, corporation, or joint-stock company.

SEC. 3. The shipment or transportation in interstate commerce from any State of contraband oil produced in such State is hereby prohibited. For the purposes of this section contraband oil shall not be deemed to have been produced in a State if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported, or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State.

SEC. 4. Whenever the President finds that the amount of petroleum and petroleum products moving in interstate commerce is so limited as to be the cause, in whole or in part, of a lack of parity between supply (including imports and reasonable withdrawals from storage) and consumptive demand (including exports and reasonable additions to storage) resulting in an undue burden on or restriction of interstate commerce in petroleum and petroleum products, he shall by proclamation declare such finding, and thereupon the provisions of section

3 shall be inoperative until such time as the President shall find and by proclamation declare that the conditions which gave rise to the suspension of the operation of the provisions of such section no longer exist. If any provision of this section or the application thereof shall be held to be invalid, the validity or application of section 3 shall not be affected thereby.

SEC. 5. (a) The President shall prescribe such regulations as he finds necessary or appropriate for the enforcement of the provisions of this Act, including but not limited to regulations requiring reports, maps, affidavits, and other documents relating to the production, storage, refining, processing, transporting, or handling of petroleum and petroleum products, and providing for the keeping of books and records, and for the inspection of such books and records and of properties and facilities.

(b) Whenever the President finds it necessary or appropriate for the enforcement of the provisions of this Act he shall require certificates of clearance for petroleum and petroleum products moving or to be moved in interstate commerce from any particular area, and shall establish a board or boards for the issuance of such certificates. A certificate of clearance shall be issued by a board so established in any case where such board determines that the petroleum or petroleum products in question does not constitute contraband oil. Denial of any such certificate shall be by order of the board, and only after reasonable opportunity for hearing. Whenever a certificate of clearance is required for any area in any State, it shall be unlawful to ship or transport petroleum or petroleum products in inter-

state commerce from such area unless a certificate has been obtained therefor.

(c) Any person whose application for a certificate of clearance is denied may obtain a review of the order denying such application in the United States District Court for the district wherein the board is sitting by filing in such court within thirty days after the entry of such order a written petition praying that the order of the board be modified or set aside, in whole or in part. A copy of such petition shall be forthwith served upon the board, and thereupon the board shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript, such court shall have jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the board shall be considered by the court unless such objection shall have been urged before the board. The finding of the board as to the facts, if supported by evidence, shall be conclusive. The judgment and decree of the court shall be final, subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347).

SEC. 6. Any person knowingly violating any provision of this Act or any regulation prescribed thereunder shall upon conviction be punished by a fine of not to exceed $2,000 or by imprisonment for not to exceed six months, or by both such fine and imprisonment.

SEC. 7. (a) Contraband oil shipped or transported in interstate commerce in violation of the provisions of this Act shall be liable to be proceeded against in any district

court of the United States within the jurisdiction of which the same may be found, and seized for forfeiture to the United States by a process of libel for condemnation; but in any such case the court may in its discretion, and under such terms and conditions as it shall prescribe, order the return of such contraband oil to the owner thereof where undue hardship would result from such forfeiture. The proceedings in such cases shall conform as nearly as may be to proceedings in rem in admiralty, except that either party may demand a trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States. Contraband oil forfeited to the United States as provided in this section shall be used or disposed of pursuant to such rules and regulations as the President shall prescribe.

(b) No such forfeiture shall be made in the case of contraband oil owned by any person (other than a person shipping such contraband oil in violation of the provisions of this Act) who has with respect to such contraband oil a certificate of clearance which on its face appears to be valid and to have been issued by a board created under authority of section 5, certifying that the shipment in question is not contraband oil, and such person had no reasonable ground for believing such certificate to be invalid or to have been issued as a result of fraud or misrepresentation of fact.

SEC. 8. No common carrier who shall refuse to accept petroleum or petroleum products from any area in which certificates of clearance are required under authority of this Act, by reason of the failure of the shipper to deliver such a certificate to such

carrier, or who shall refuse to accept any petroleum or petroleum products when having reasonable ground for believing that such petroleum or petroleum products constitute contraband oil, shall be liable on account of such refusal for any penalties or damages. No common carrier shall be subject to any penalty under section 6 in any case where (1) such carrier has a certificate of clearance which on its face appears to be valid and to have been issued by a board created under authority of section 5, certifying that the shipment in question is not contraband oil, and such carrier had no reasonable ground for believing such certificate to be invalid or to have been issued as a result of fraud or misrepresentation of fact, or (2) such carrier, as respects any shipment originating in any area where certificates of clearance are not required under authority of this Act, had no reasonable ground for believing such petroleum or petroleum products to constitute contraband oil.

SEC. 9. (a) Any board established under authority of section 5, and any agency designated under authority of section 11, may hold and conduct such hearings, investigations, and proceedings as may be necessary for the purposes of this Act, and for such purposes those provisions of section 21 of the Securities Exchange Act of 1934 relating to the administering of oaths and affirmations, and to the attendance and testimony of witnesses and the production of evidence (including penalties), shall apply.

(b) The members of any board established under authority of section 5 shall be appointed by the President, without regard to the civil service laws but subject to the

Classification Act of 1923, as amended; and any such board may appoint, without regard to the civil service laws but subject to the Classification Act of 1923, as amended, such employees as may be necessary for the execution of its functions under this Act.

SEC. 10. (a) Upon application of the President, by the Attorney General, the United States District Courts shall have jurisdiction to issue mandatory injunctions commanding any person to comply with the provisions of this Act or any regulation issued thereunder.

(b) Whenever it shall appear to the President that any person is engaged or about to engage in any acts or practices that constitute or will constitute a violation of any provision of this Act or of any regulation thereunder, he may in his discretion, by the Attorney General, bring an action in the proper United States District Court to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

(c) The United States District Courts shall have exclusive jurisdiction of violations of this Act or the regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or the regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this Act or regulations thereunder, or to enjoin any violation of this Act or any regulations thereunder, may be brought in any such district or in the

district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347).

SEC. 11. Wherever reference is made in this Act to the President, such reference shall be held to include, in addition to the President, any agency, officer, or employee who may be designated by the President for the execution of any of the powers and functions vested in the President under this Act.

SEC. 12. If any provision of this Act, or the application thereof to any person or circumstance, shall be held invalid, the validity of the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 13. This Act shall cease to be in effect on June 16, 1937. Approved, February 22, 1935.

Act of June 14, 1937, c. 335, 50 Stat. 257 (U. S. C., Supp. IV, Title 15, sec. 715l):

AN ACT To continue in effect until June 30, 1939, the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13 of the Act entitled "An Act to regulate interstate and foreign commerce in pe-

troleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935, is amended by striking out "June 16, 1937" and inserting in lieu thereof "June 30, 1939".

Approved, June 14, 1937.

Section 13, Revised Statutes (U. S. C., Title 1, Sec. 29):

§ 29. *Repeal of statutes as affecting existing liabilities.*—The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. (R. S. § 13.)

From Act Feb. 25, 1871, c. 71, § 4, 16 Stat. 432.

APPENDIX B

Statutes which have expressly abrogated the common-law rule as to the effect of the repeal of a statute on prior violations:

ALABAMA: Code (Mitchie, 1928), Section 5532.

ARIZONA: Revised Code (Struckmeyer, 1928), Section 3046.

ARKANSAS: Statutes (Pope, 1937), Section 13283.

CALIFORNIA: Political Code (1937), Section 329.

COLORADO: Ann. Statutes (Mitchie, 1935), Chapter 159, Section 4.

CONNECTICUT: Gen. Statutes (1930), Section 6561.

FLORIDA: Constitution, Article III, Section 32.

GEORGIA: Code (1936), Title 26, Section 103.

HAWAII: Revised Laws (1935), Section 27.

IDAHO: Code (1932), Section 65–513.

ILLINOIS: Statutes (Jones, 1934), Section 27.16.

INDIANA: Statutes Ann. (Burns, 1933), Section 1–307.

IOWA: Code (1935), Section 63 (1).

KANSAS: General Statutes (Corrick, 1935), Section 77–201 (first).

KENTUCKY: Statutes (Carroll, 1936), Section 465.

MAINE: Revised Statutes (1930), Chapter 1, Section 5.

MARYLAND: Code (Bagby, 1924), Article 1, Section 3.

MASSACHUSETTS: General Laws (1932), Chapter 4, Section 6 (second).

MICHIGAN: Statutes Annotated (Henderson, 1936), Section 2.214.

MINNESOTA: Statutes (Mason, 1927), Section 10930.

MISSISSIPPI: Code (1930), Section 1361.
MISSOURI: Statutes Annotated (1932) Section 662.
MONTANA: Revised Codes (1935) Chapter 5, Section 97.
NEBRASKA: Compiled Statutes (1929) Section 49–301.
NEVADA: Compiled Laws (Hillyer, 1929) Section 11265.
NEW HAMPSHIRE: Public Laws (1926) Chapter 2, Section 36.
NEW JERSEY: Revised Statutes (1937) Section 1:1–15.
NEW MEXICO: Constitution, Art. IV, Section 33.
NEW YORK: Consolidated Laws (Baldwin, 1938), General Construction, Section 93.
NORTH CAROLINA: Code (1935) Section 3948.
NORTH DAKOTA: Compiled Laws (1913) Section 7316.
OHIO: General Code (Page, 1937), Section 26.
OKLAHOMA: Constitution, Article 5, Section 54; Statutes (1931), Section 13511.
OREGON: Annotated Code (1930) Section 14–1008.
RHODE ISLAND: General Laws (1923) Section 417.
SOUTH DAKOTA: Compiled Laws (1929) Section 39.
TENNESSEE: Code (Mitchie, 1938) Section —.
UTAH: Revised Statutes (1933) Section —.
VERMONT: Public Laws (1933) Section 33.
VIRGINIA: Code (1936) Section 6.
WASHINGTON: Revised Statutes (Remington, 1932) Section 2006.
WEST VIRGINIA: Code (1937) Section 31.
WISCONSIN: Statutes (1937) Section 370.04.
WYOMING: Revised Statutes (1931) Section 112–104.

CANADA—Revised Statutes (1927) Chapter 1, Section 19:

ALBERTA: Revised Statutes (1922) Chapter 1, Section 13 (b).

BRITISH COLUMBIA: Revised Statutes (1936) Chapter 1, Section 13 (1) (b).

MANITOBA: Revised Statutes (1913) Chapter 105, Section 31.

NEW BRUNSWICK: Consolidated Statutes (1927) Chapter 1, Section 31.

NEWFOUNDLAND: Consolidated Statutes (1936) Chapter 1, Section 8 (c).

NORTHWEST TERRITORIES: General Ordinance (1905) Interpretation; Section 52.

NOVA SCOTIA: Revised Statutes (1923) Chapter 1, Section 12.

ONTARIO: Revised Statutes (1937) Chapter 1, Section 14 (d).

SASKATCHEWAN: Revised Statutes (1930) Chapter 1, Section 39 (c).

AUSTRALIA—LAWS (McGrath & Sullivan, 1932) Acts Interpretation Act, Section 8 (d):

NEW SOUTH WALES: Incorporated Acts (1933) Vol. 10, p. 373, Section 8 (c).

QUEENSLAND: Statutes (1911) Vol. III, p. 3055, Section 5.

SOUTH AUSTRALIA: Statutes, 1837–1936 (1937) Acts Interpretation Act, Vol. I, p. 62, Section 16 (1) IV.

TASMANIA: Public General Act, 1826–1936 (1936) Acts Interpretation Act, Vol. I, p. 14, Section 16 (1) IV.

VICTORIA: Statutes (1929) Vol. I, p. 38, Section 6 (2) (d).

WESTERN AUSTRALIA: Acts, 1918, Interpretation, p. 12, Section 16 (1) (e).

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